Argued 2-4 6th Monday

13 — 76 —

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~206.~~ 78

CHARLES R. TYNG AND LAWRENCE Y. HOPKINS, PLAINTIFFS IN ERROR,

vs.

MOSES H. GRINNELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 21 1873.

Affirmed —

Jus Davis

Clerk

SUPREME COURT OF THE UNITED STATES.

No. 296.

CHARLES R. TYNG AND LAWRENCE Y. HOPKINS, PLAINTIFFS IN ERROR,

vs.

MOSES H. GRINNELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Charles R. Tyng and Lawrence Y. Hopkins, plaintiffs in error, against Moses H. Grinnell, defendant in error, a manifest error hath happened, to the great damage of the said Charles R. Tyng and Lawrence Y. Hopkins, plaintiffs in error, as is said, and as appears by the complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 2d Monday of October, 1873, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, next in precedence to the late Chief-Justice, this seventh day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed October 7th, 1873.

SAML. BLATCHFORD,
District Judge.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to 174 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Charles R. Tyng & al., plaintiffs in error, ag'st Moses H. Grinnell, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the second circuit, the 9th day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the said United States the ninety-eighth.

SEAL. KENNETH G. WHITE, *Clerk.*

3. U. S. circuit court for the southern district of New York.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at

the United States court buildings in the city of New York, of the term of April, 1870, to wit, of the 14th day of May, in the year of our Lord one thousand eight hundred and seventy.

Witness the honorable Lewis B. Woodruff, one of the judges of the said circuit court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that, heretofore, to wit, on the 12th day of May, 1870, in April term of said year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, came Charles R. Tyng and Lawrence Y. Hopkins, by Buel & Erhardt, their attorneys, and brought into the said court, before
4 the aforesaid judges thereof, then there, their certain declaration against Moses H. Grinnell, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

5 U. S. circuit court.

CHARLES R. TYNG AND LAWRENCE Y. HOPKINS
agst.
MOSES H. GRINNELL.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court, and, by Buel & Erhardt, their attorneys, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 12th day of April, 1870, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practices of said court in such case made and provided, in favor and in the name of the said plaintiffs, against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said court. That the defendant afterward, by his attorney only, appeared in said action, and such proceedings were thereupon had, that afterward, on the 3rd day of May, in the year of our Lord one thousand eight hundred and seventy, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendants be continued in this court.

And the plaintiffs accordingly, by their attorneys aforesaid, complain of the defendant herein in a plea of trespass on the case, for that whereas the said defendant, on the 12th day of April, one thousand eight hundred and seventy, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of five hundred dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said de

fendant, and at the special instance and request of the said defendant, and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant, and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs, and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested; and whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff' and then and there being in arrear and unpaid, and upon such accounting the said defendant was found to be in arrear and indebted to the said plaintiffs in the further sum of five hundred dollars *dollars*, of lawful money as aforesaid, and being so found in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterward requested. Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of five hundred dollars; and thereof the plaintiff' bring suit, &c.

BUEL & ERHARDT,
Attorneys for Plaintiff'.

6 U. S. circuit court.

CHARLES R. TYNG ET AL.
vs.
MOSES H. GRINNELL.

Please take notice that the following is the plaintiffs' bill of particulars in this action.

Yours, very truly,

BUEL & ERHARDT,
Plaintiffs' Attorneys.

TO EDWARDS PIERREPONT, ESQR.,
Defendant's Attorney.

Claim for excess of duties erroneously and illegally exacted, (at the rate of one cent per pound,) and paid under protest, on invoice of "wrought-iron flues" imported by Tyng & Co., composed of Charles R. Tyng & Lawrence Y. Hopkins, in steamship "The Queen," from Liverpool:

Dates of invoices, December 11th, 1869, & December 22d, 1869.
Date of entry, January 21st, 1870.
Date of liquidation, February 12th, 1870.
Protest filed against exaction, February 19th, 1870.
Date of appeal thereon to Secretary of the Treasury, March 11th, 1870.

Date of Secretary's decision on such appeal, affirming liquidation, April 9th, 1870.

Dates of payment.	On what No. pounds.	Amount of excess in duties.
1870.		
Feb. 15	174	1 74
" "	2,848	28 48
7 1870.		
Feb. 17	3,696	36 96
M'ch 2	3,696	36 96
" 14	6,028	60 28
" 18	440	4 40
" 22	308	3 08
April 9	146	1 46
	Gold,	173 36

That amount of duty claimed to have been exacted in excess.

8 *Plea.*

U. S. circuit court, southern district of New York.

MOSES H. GRINNELL *ads.* CHARLES R. TYNG ET AL. } No.

And the said defendant, Moses H. Grinnell, by Edwards Pierrepont, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country.

And the said plaintiffs do the like, &c.

9 Therefore, the issue above joined is ordered by the said court to be tried at the circuit court appointed to be held at the United States court buildings, in the city of New York, on the first Monday of April, in the year 1871.

At which day and place before Hon. Lewis B. Woodruff, judge of the said circuit court, according to the form of the statute in such case made and provided, come, as well the said plaintiffs as the said defendant, by their respective attorneys aforesaid; the said attorneys having signed a stipulation waiving a trial by jury, and consenting that the said issue be tried before the judge of the said court, without a jury; and the said stipulation having been filed with the clerk of the said court, it was ordered by the said court that the said issues be tried by the court without a jury.

And thereupon the said issue was moved to trial before the said court, and the said court having heard the proofs and allegations of the respective parties, the said court finds in due form of law the facts in said case, as follows:

First. That on the eleventh of December, 1869, and on the 22d of December, 1869, the plaintiffs imported into the United States, at
10 the port of New York, certain goods and merchandise, which

they entered in due form at the custom-house in said city as "wrought-iron flues," and claimed that duty should be charged thereon at a rate of 2½ cents per pound; that upon such entry the said goods and merchandise were classified and appraised by and under the direction and authority of the defendant as "wrought-iron tubes," and the duties were liquidated thereon at 3½ cents per pound pursuant to the act of Congress of the United States approved March 3d, 1865; that said plaintiffs duly protested against the liquidation and payment of said duties at 3½ cents per pound, at the time and in the form prescribed by law, and filed their written protest with said defendant specifying their grounds of protest to the substance and effect that said goods were "wrought-iron flues," subject by the tariff act of June 30, 1864, to a duty of 2½ cents per pound only, and were not subject to a duty of 3½ cents per pound under the tariff act of March 30, 1865, nor under any statute, and that the liquidation and exaction of 3½ cents per pound
11 is illegal; that the said plaintiffs thereupon paid to said defendant the duties exacted by him for the purpose of obtaining possession of said goods, which excess duties beyond 2½ cents per pound amounted to $173.36 in gold, which at the time of said trial, with interest and premium on gold, amounted to the sum of two hundred dollars in currency; that thereupon the said plaintiffs appealed in due form to the Secretary of the Treasury from the exaction and decision of the said defendant, and afterwards the said the Secretary of the Treasury affirmed said decision and exaction, and thereupon said plaintiffs, within the time prescribed by law, brought this action to recover from said defendant the said alleged excess of duties.

Second. That during all the time aforesaid the said defendant was collector of the port of New York, and in doing the several acts aforesaid acted in his official capacity.

Third. That said goods and merchandise so entered, and upon which the said duties were paid, were at the time of the passage of the said several tariff acts of 1864 and of 1865 known in commerce and to dealers therein as and by the name of "wrought-iron tubes," by
12 which name the same were and had been at all times imported into the United States by the merchants and importers of the United States importing and dealing therein: and the same continued to be so known, designated, imported, and dealt in, to and including the time of the enactment of the act of March 3, 1865, and a long time thereafter; and that the same were at all times during the period aforesaid entered by the said merchants and importers at the custom-house aforesaid, and classified by the officers of said custom-house, as and by their said commercial name of "wrought-iron tubes."

That one of the purposes for which such articles as were so imported and entered by the plaintiffs are, and were in 1864 and 1865, employed, and by far the greatest and most extensive use was, for flues in tubelar steam boilers; and generally when wrought-iron tubes were ordered from manufacturers in the United States, or by manufacturers of boilers from an importer in the United States, for such purposes, they were called flues, to indicate the use to which they were destined or employed, to wit, to conduct the products of combustion through the boiler,
13 and thereby contribute to heat the water contained therein, and when so designated by manufacturers or dealers it was understood and known that tubes of definite equal lengths were desired.

Wrought-iron tubes are constructed for various purposes, and are sometimes welded by joining the edges of the sheet of iron curved for the pur-

pose, and sometimes by lapping those edges and welding them thus lapped. Tubes joined in the former mode are called "butt-welded wrought-iron tubes," when joined in the latter mode are called "lap-welded wrought-iron tubes," and for use as flues lap-welded tubes are alone suitable, and are understood to be intended whenever wrought-iron tubes are designated as wrought-iron flues.

"Wrought-iron flues" is a subordinate designation used to indicate the purpose to which the tubes are to be employed when ordered for such specific purpose; but they are included in the general designation of "wrought-iron tubes," by which name alone, whether butt-welded or lap-welded, they were known in trade and commerce until after the act of 1865, as above stated.

Fourth. That the said goods were "wrought-iron tubes" within the true meaning of the act of Congress entitled "An act amenda-
14 tory of certain acts imposing duties upon foreign importations, approved March 3, 1865," and as such were properly classified and designated by the said defendant as collector as aforesaid, and were subject to the duty imposed and paid thereon of $3\frac{1}{2}$ cents per pound.

Wherefore judgment is ordered by the court for the said defendant.

Thereupon all and singular the premises aforesaid being seen, and by the said court here fully understood, & mature deliberation being thereupon had, it appears to the said court here that the said defendant did not undertake and promise in manner and form as the said plaintiffs have above complained against him.

Therefore, it is considered that the said plaintiffs take nothing by their said declaration, but that they be in mercy, &c., and that the said defendant do go thereof without day, &c. And it is further considered by the said court now here that the said defendant do recover against the said plaintiffs eighty-five $\frac{69}{100}$ dollars for his costs and charges by him about his defence in this behalf laid out and expended, by the said court here adjudged to the said defendant and with his assent,
15 according to the form of the statute in such case made and provided; and that the said defendant have execution thereof, &c.

Judgment signed this 9th day of January, 1872.

R. E. STILWELL,
Dep. Clerk.

(Endorsed:) U. S. circuit court. Moses H. Grinnell ads. Charles R. Tyng & Lawrence Y. Hopkins. Judgment-record. Noah Davis, attorney for defendant. Filed January 9th, 1872.

16 *Bill of exceptions.*

U. S. circuit court, second circuit, southern district of New York.

CHARLES R. TYNG AND LAWRENCE Y. HOPKINS
versus
MOSES H. GRINNELL.

The issue joined in this action came on for trial at a circuit court held at the court-rooms in the city of New York by and before the Hon. Lewis B. Woodruff, circuit judge, on the 12th day of June, 1871, the plaintiffs appearing by Buel & Erhardt, their attorneys, and the defendant by Noah Davis, U. S. attorney; and it appearing that the parties, by their respective attorneys, had heretofore made and filed a stip-

ulation that the said action should be tried by the said court without a jury, it was ordered that the same be tried accordingly.

17 And the said court having heard the proofs and allegations of the respective parties, and due deliberation having been had thereupon, found the following facts in said case, evidence having been given on such trial tending to establish each and every of the several facts so found.

First. That on the 11th day of December, 1869, and on the 23d day of December, 1869, the plaintiffs imported into the United States, at the port of New York, certain goods, wares, and merchandise, which they entered in due form at the custom-house in said city as "wrought-iron flues," and claimed that duty should be charged thereon at a rate of 2½ cents per pound; that upon such entry the said goods and merchandise were classified and appraised by and under the direction and authority of the defendant as "wrought-iron tubes," and the duties were

18 liquidated thereon at 3½ cents per pound, pursuant to the act of Congress of the United States approved March 3d, 1865.

That the said plaintiffs duly protested against the liquidation and payment of said duties at 3½ cents per pound, at the time and in the form prescribed by law, and filed their written protest with said defendant, specifying their grounds of protest, to the substance and effect that said goods were "wrought-iron flues," and subject by the tariff act of June 30, 1864, to a duty of 2½ cents per pound only, and were not subject to a duty of 3½ cents per pound under the tariff act of March 3d, 1865, nor under any statute, and the liquidation and exaction of 3½ cents per pound is illegal.

That the plaintiffs thereupon paid to said defendant the duties exacted by him for the purpose of obtaining possession of said goods, which excess of duties beyond 2½ cents per pound amounted

19 to $173.36 in gold, which, at the time of said trial, with interest and premium on gold, amounted to the sum of two hundred dollars in currency.

That *that* thereupon the said plaintiffs, within the time prescribed by law, appealed in due form to the Secretary of the Treasury from the exaction and decision of the said defendant, and afterwards the said Secretary of the Treasury affirmed said decision and exaction; and thereupon said plaintiffs, within the time prescribed by law, brought this action to recover from said defendant the said alleged excess of duties.

Second. That during all the time aforesaid the said defendant was collector of the port of New York, and in doing the several acts aforesaid acted in his official capacity.

Third. That said goods and merchandise so entered, and upon

20 which the said duties were paid, were at the time of the passage of the said several tariff acts of 1864 and 1865 known in commerce and to dealers therein as and by the name of "wrought-iron tubes," by which name the same were, and had been, at all times imported into the United States by the merchants and importers of the United States importing and dealing therein, and the same continued to be so known, designated, imported, and dealt in to and including the time and enactment of the act of March 3d, 1865, and a long time thereafter; and that the same were at all times during the period aforesaid entered by the said merchants and importers at the custom-house aforesaid and classified by the officers of said custom-house as and by their said commercial name of "wrought-iron tubes." That one of the purposes for which such articles as were so imported and entered by

21 the plaintiffs are, and were in 1864 and 1865, employed, and by

far their greatest and most extensive use, was, for flues in tubular steam-boilers; and generally when "wrought-iron tubes" were ordered from manufacturers in the United States, or by manufacturers of boilers from an importer in the United States for such purpose, they were called "flues," to indicate the use for which they were destined or employed, to wit, to conduct the products of combustion through the boiler, and contribute to heat the water contained therein; and, when so designated by manufacturers or dealers, it was understood and known that tubes of equal length were desired.

Wrought-iron tubes are constructed for various purposes, and are sometimes welded by joining the edges of the sheet of iron curved for that purpose, and sometimes by lapping the edges and welding
22 them thus lapped. Tubes joined in the former mode are called "butt-welded" wrought-iron tubes. When joined in the latter mode, they are called "lap-welded" wrought-iron tubes; and for uses as "flues" "lap-welded" tubes are alone suitable, and are understood to be intended whenever "wrought-iron tubes" are designated as "wrought-iron flues." "Wrought-iron flues" is a subordinate designation used to indicate the purpose for which the tubes are to be employed when ordered for such specific purpose; but they are included in the general designation of "wrought-iron tubes," by which name alone, whether "butt-welded" or "lap-welded," they were known in trade and commerce until after the act of 1865, as above stated.

Fourth. From which aforesaid facts, the said court finds that the said goods were wrought-iron tubes within the true meaning of
23 the act of Congress entitled "An act amendatory of certain acts imposing duties upon foreign importations," approved March 3d, 1865, and, as such, properly classified and designated by the said defendant, as collector, as aforesaid, and were subject to the duty imposed and paid thereon of 3½ cents per pound.

Thereupon, counsel for the plaintiff then and there duly excepted to the concluding part of the third finding of the court, to wit, that part which finds that these articles, (to wit, the articles described in said finding,) whether "butt-welded" or "lap-welded," were known only by the name of "wrought-iron tubes" in trade and commerce until after the act of 1865.

And thereupon counsel for the plaintiffs then and there further duly excepted to the fourth finding of the court, to wit: "That the
24 said goods were 'wrought-iron tubes' within the true meaning of the act of Congress entitled 'An act amendatory of certain acts imposing duties upon foreign importations,' approved March 3d, 1865, and, as such, properly classified and designated by the said defendant, as collector as aforesaid, and were subject to the duty imposed, and paid thereon, of 3½ cents per pound," and to each and every part of said finding.

On the trial the following testimony was given as to the time when articles similar to those imported by the plaintiffs were first made or known in this country:

25 LEONARD PHLEGER, defendant's witness, testified that he had been an engineer and machinist for forty-seven years.

Q. (By defendant's counsel.) These tubes you used in 1824 were, I suppose, butt-welded?

A. I think they were copper. They might have been butt-welded. There was no lap-welded made, I think, until the years 1847 and 1848.

On the trial certain articles, marked "Plaintiffs' Exhibit 1 and 2," were

proved to be articles of the same class, character and description as those imported by the plaintiffs and specified in their invoices and entry.

The following is the testimony given on the trial upon the point sought to be established by plaintiffs, that at and before the time of the passage of the said tariff acts of 1864 and 1865 there were not in the markets of the United States any other articles of merchan-
26 dise or importation made of wrought iron known, called, or used as "flues" excepting articles similar to those imported by the plaintiffs in this case.

THOMAS M. TYNG, plaintiffs' witness, testified that he had been in business as importer and merchant in articles similar to plaintiffs' Exhibit 1 and 2 since 1857.

Q. (By plaintiffs' counsel.) Are there any other articles sold as merchandise which are used as boiler-flues except articles similar to these here?

A. No, sir; similar to Exhibit 1 and 2.

Q. Were any other articles imported for use as boiler-flues before 1864 except articles like plaintiffs' Exhibits 1 and 2?

A. No, not to my knowledge.

Q. Have any been imported since, to your knowledge?

A. Never. Of course, there were different sizes.

Q. Were any articles sold in the markets of this country before
27 1864 for use as boiler-flues except articles similar to plaintiffs' Exhibits 1 and 2?

A. I never heard of any or knew of any.

Q. Have any been sold since?

A. Never to my knowledge.

Q. Are riveted flues ever imported?

A. No, sir.

Q. Are they an article of merchandise at all?

A. No, sir; I never knew of their being bought or sold. They are made by the boiler-makers in making the boilers.

Q. In the other boilers in which lap-welded flues are used, do they answer the same purpose as riveted flues?

A. They are the same thing, except there are more of them and they are smaller in diameter.

THOMAS F. ROWLAND, plaintiffs' witness, testified that he was proprietor of the Continental Iron Works, Green Point; had been in business as a manufacturer of boilers for 22 years and had been ordering flues for the last 15 years in this market.

28 Q. (By plaintiffs' counsel.) Are these riveted flues an article of merchandise at all?

A. Not to my knowledge. They are only sold as a finished boiler.

Q. They are made by the boiler-makers in constructing the boiler?

A. Yes, sir. They are a part of the boiler, the same as the head and shell are.

JOSEPH G. HARRISON, plaintiffs' witness, testified that he was proprietor of the North River Iron Works, and a boiler-maker for 18 years.

Q. (By plaintiff's counsel.) Before lap-welded flues came into use how were flues built?

A. They were made of boiler-plates rolled up and riveted together—riveted in sections.

Q. Are these riveted flues an article of merchandise at all?

A. Not by themselves.

Q. Could one buy them?

A. I never knew one to be made for sale.

Q. Boiler-makers make them themselves?

29 A. Yes, sir. They vary with the boiler, and are constructed in a varying shape for the particular boiler.

WILLIAM W. VANDERBILT, defendant's witness, testified that he was an engineer for 45 years; formerly, for many years, chief engineer of the Pacific Mail Steam Ship Company.

Q. (By defendant's counsel.) Did the construction of the boilers of these ships come under your direction.

A. Yes, sir.

Q. You prepared plans and specifications?

A. Yes, sir; and had charge generally.

Q. Where has the work been done here?

A. Mostly at the Novelty Iron Works.

Q. Have you been familiar with these articles called plaintiffs' Exhibits 1 and 2?

A. I have been familiar with them for years.

Q. Have you been familiar with the name by which they have been known?

A. Yes, sir.

Q. What is the name by which they have been known?

30 A. They have always been known by me as tubes, in engineer's terms.

(Objected to on the ground that the name by which they were known by the witness was not evidence.)

Q. (By the court.) How have they been known in your experience generally, not how you have known them yourself?

A. As boiler-tubes.

Q. Have you had occasion to deal largely in them, or to be connected with them extensively?

A. I will have to explain that. I have never given orders directly for them, but in my position I had to make requisition for them on the purveyor of the company, and he gave the orders.

Q. What I wish to get at is, whether these orders were extensive?

A. Yes, sir.

Q. Running through a number of years?

A. Yes, sir; for the last ten years.

Q. For what are these tubes used? (Pointing to plaintiffs' Exhibits 1 and 2.)

31 A. They are used for making tubular boilers.

Q. What do you mean by tubular boilers?

A. The tubular boiler is constructed with tubes that are lap or butt welded and drawn, and which constitute in my engineer's phrase a tube.

Q. That name distinguishes them from what other boiler?

A. That distinguishes them from what we call a flue boiler.

Q. What is known as a flue-boiler?

A. Those where the sheets are riveted together to make one continuous flue.

Q. Have you been familiar with the use of this sort of boiler in which the tube is used to contain water?

A. Yes, sir.

Q. What are they called?

A. Tubular boilers.

Q. Have they been extensively used?

A. They were some time ago, but not so much of late.

Q. About how many years ago was this kind of boiler extensively used?

A. During the time the Collins steamships were building, some years ago; all their boilers were built of that character.

32 Q. Is not that kind of boiler used in the Navy?

A. Yes, sir; it has been extensively used in the Navy.

Q. I mean the United States Navy.

A. Yes, sir, the United States Navy.

Q. Are you familiar with the boilers in which are combined the flue and tube?

A. Yes, sir. I have seen many of them.

Q. How are they constructed?

A. The lower parts of the boiler, directly from the furnace, are made with flues riveted together, and the heat and smoke returns through the tubes to the chimney, or uptake, and then passes out.

Q. In these boilers the flue carries the product of combustion in one direction, and there it passes through the tubes in another before it goes up the chimney?

A. Yes, sir; in these you have spoken of.

Q. Can you shew me some illustrations?

(The witness takes volume of "Isherwood's Experimental Researches in Steam-Engineering," and turns to page 236.)

33 A. There is a boiler similar to what you have enquired about. It represents the one in the steamer James Bell. It is constructed with flues and tubes, and we term it a flue and tubular boiler combined. There is the furnace, (pointing to the diagram.) The heat passes through a set of flues, that are represented here, of a larger diameter than the tubes, and it passes through into this combustion-chamber, or "back connection," as we call it, and returns through a series of tubes into the front connection. Here is a Martin boiler, (opening at page 94 of the same volume, to the diagram of the boiler on the steamer Michigan.) There are no flues in that, but there are arches. The heat goes around the tubes, and the water is inside of them. Here is the Crusader boiler. The heat passes through the arches and returns through the flues. It is the same in principle as the first one I shewed, but there are no large flues.

Q. Are the tubes in this boiler made of this article?

34 A. Similar. They are lap-welded and drawn, as it were, and not riveted.

Q. What kind of a boiler is that? (pointing to a diagram of the boiler used on the steamer Valley City.)

A. That is what is termed a flue and tubular boiler.

Q. (By the court.) In each of these the tubes you have described are like these Exhibits Nos. 1 and 2.

A. Yes, sir.

Q. Are you acquainted with Bartol's work on marine-boilers?

A. Yes, sir.

Q. Look at that diagram in Bartol's work, and see if that is the same kind of boilers we have been speaking of?

A. Yes, sir; that is a sketch of a flue and tubular boiler.
Q. Where they are combined?
A. Yes, sir.
Q. On what steamer?
A. The Gorgona.
Q. These tubes are the same article?
A. The same articles as these exhibits.
35 Q. Look at the diagram of the steamer Merchant. What kind of a boiler is that?
A. That is a tubular boiler, without flues.
Q. The Hudson River?
A. That is tubular.
Q. (Referring to diagram.) Here is the Monumental City. What kind of a boiler is that?
A. That is a tubular boiler.
Q. Are there any here where the water is contained in the pipes?
A. I don't know as to that; that was a Martin boiler originally. The water is in the tubes. The Martin boiler of the present day does not have double furnaces. Those tubes are vertical, and are filled with water.
Q. Are you familiar with other uses to which these articles are put?
A. Those two articles there.
Q. Yes, similar articles.
A. They are used frequently for boiler-tubes.
Q. That is their chief use, but I speak of other uses to which they are applied in making engines?
36 A. We use them as pipes all through ships for water and steam.
Q. Pipes for what purpose?
A. Pipes for conveying water and steam to different parts of the vessel independent of the boilers.
Q. In what manner are they connected to the ship?
A. They are connected in the first place by a valve on the boiler to have more or less steam, and they are then united by couplings or unions that run around the ship more or less. That three-quarter inch pipe is one connection. We have other styles of connection which I don't see here, such as couplings, &c. That mark "$3\frac{1}{4}$ inch" is intended to give the size of the pipe.
Q. State further, if you can, as to the uses to which they are applied.
A. They are used very much in our ships.
Q. (Handing witness defendant's Exhibit 1 and 2.) What are those?
A. Those are intended for boiler-tubes, evidently, from their extra thickness.
Q. They can be used for that purpose?
A. They are intended for that purpose.
37 Q. Are these tubes made of various thicknesses?
A. Yes, sir; according to order.
Q. In some instances they are required to be much thicker than in others?
A. Some people do give such orders to have them thicker. Usually they are made according to the diameter of a certain thickness only when ordered specially.

Cross-examined by Mr. Buel:

Q. Did you ever see a three-and-a-quarter-inch boiler-tube of that thickness of iron?
A. I cannot say that I did.

Q. A three-and-a-quarter-inch tube for boilers, if of that diameter, would be made of thinner iron, would it not?

A. Yes, sir; generally speaking, unless specially ordered.

Q. And for those boiler-tubes, it is not necessary to cut threads, is it, or put on couplings when used in boilers?

A. Not without there was a special order to that effect.

Q. Commonly?

A. Not commonly.

38 Q. And if ordered for any other purpose, are they ordered of a special thickness for those special purposes?

A. Yes, sir; they are.

Q. That is not a sample at all of a boiler-tube, is it, in its ordinary use?

A. I have not said so. No, sir. I say it is not.

Q. You say that when ordered for special uses, requiring couplings and threads, they are made of special thickness?

A. Yes, sir; and made specially for that purpose.

Q. (Handing witness defendant's Exhibits 1 and 2.) What do you say those articles are?

A. I say they are tubes.

Q. Are those the same sort of tubes as plaintiffs' Exhibits 1 and 2?

A. They are made of the same material.

Q. What is the diameter of defendant's Exhibit No. 1?

A. Do you mean internal or external diameter?

Q. How would that be ordered, by internal or external diameter?

A. For boilers, external.

39 Q. How would that be ordered for articles of that kind?

A. I don't know.

Q. How are lap-welded tubes always ordered?

A. External diameter,

Q. What is the external diameter of defendant's Exhibit No. 1?

A. The external diameter of that I take to be two inches, as near as I can tell. I should call that a two-inch tube external.

Q. Is not that thicker than the ordinary two-inch tube used for boilers?

A. Yes, sir.

Q. Made of a special thickness?

A. Yes, sir.

Q. And for a special purpose?

A. I presume it to be. I should not make it that size for a boiler-tube.

Q. Look at defendant's Exhibit 2. Is that of a special thickness for a special purpose?

A. I should take that to be of the usual thickness of that size.

Q. What is the thickness of the other iron?

A. I didn't measure the thickness of the other iron. I take the

40 iron in both cases to be about one thickness.

Q. Is the thickness of iron in these tubes greater than in ordinary boiler-tubes for use in boilors?

A. I have so answered that they are.

Q. Have you heard the term boiler-flues applied to these articles?

A. Do you mean generally or ever?

Q. Have you ever heard the term boiler-flues applied to those articles?

A. Yes, sir.

Q. Frequently?

A. No, sir.

Q. You didn't send on the order yourself for these articles?
A. I did not.
Q. You merely made requisition on some other officer and he sent in the order?
A. Yes, sir.
Q. Do you know how he ordered those articles?
A. Yes, sir.
Q. From personal observation and personal sight of the order?
A. No; I cannot say that, sir. When my requisition was hand-
41 ed in I cannot say what changes he may have made in the term.
Q. Then your knowledge of usage is limited to the fact that you used a large number of these articles in your business, and that you were in the habit of making requisitions for them under the name of boiler-tubes. Is that so?
A. Yes, sir.
Q. You never were a merchant in these articles, of course?
A. No, sir.
Q. About these tubular boilers in which the tube holds the water, you say they were used in the Collins line of steamers and in the Navy?
A. Yes, sir.
Q. Do you know of any other lines in which they were used?
A. No other line of steamers.
Q. Any other vessels, excepting in the Navy, and in the Collins steamers?
A. In other vessels? Yes, sir; but when the question is confined to "line," I cannot say.
Q. Were they used in the Navy?
A. They were to a great extent.
Q. Their principal use?
42 A. I cannot say principal. They were largely used.
Q. More largely in the Navy than outside?
A. Yes, sir.
Q. And those used in the Navy were under some special patent, were they not?
A. Yes, sir.
Q. It was the Martin boiler?
A. So called the Martin boiler.
Q. When the tubes in those boilers hold the water, are they made in precisely the same way as the tubes when they are used to serve the same purpose as the riveted flues are?
A. I cannot say. I never have seen them made for any special purpose.
Q. Are they set in the same way in the boilers?
Usually. Yes, sir.
Q. Are they of the same thickness, or when they hold the water, are they made of a greater thickness?
A. I am unable to answer that question.
Q. You don't know whether they are alike or not?
A. Positively not.
43 Q. In these tubular boilers in which the tubes are for carrying the heat, are the tubes in that case for the same purpose as the riveted flues in what you call the flue-boilers?
A. They are used for carrying off the combustion and smoke and gas, &c., but they are used one way for the flue and returned through the tube.
Q. But they are used for the same purpose?

A. Yes, sir.

Q. Then, why in those boilers do you call one article a flue and the other a tube?

A. My reason for that is that in one case the flue is riveted together by a certain number of sheets put together and so riveted and caulked; and in the other case it is one continuous tube drawn or welded, butt or lapped, as the case may be. It is only a term used by us engineers to indicate the difference between tubes and flues. The flue is what we call the riveted one and the tube has no rivet in it at all.

Q. That is the reason you use the different name?

A. Yes, sir; as engineers.

44 Q. And you are speaking of your own personal knowledge as an engineer?

A. My own personal knowledge.

Q. You never knew of those riveted flues being bought and sold in the market as an article of merchandise, did you, independent of the boilers?

A. No, sir.

Q. Or of being imported?

A. Not of being imported as a whole; no, sir.

Q. Did you ever know any article known in trade or commerce bought or sold as an article of merchandise, imported, known or called a wrought-iron flue excepting articles similar to plaintiffs' Exhibits 1 and 2?

A. To my knowledge, no, sir.

Redirect:

Q. In describing the difference between flues and tubes you spoke of its being known to you as an engineer. Is the same thing recognized by all authorities in your profession!

(Objected to.)

The COURT. You may ask him if in his knowledge the arrange-

45 ment is universal.

Mr. DAVIS. Answer that question.

Yes, sir; it is so.

JOHN L. PEAKE sworn on behalf of defendant.

Examined by Mr. Davis:

Q. What is your present occupation?

A. I am an engineer.

Q. What has been your occupation for the last ten years?

A. Engineering.

Q. What position have you held as engineer for the last 10 years?

A. I have been superintendent and chief engineer in the Navy for the past 18 years.

Q. You are not in the Navy now?

A. No, sir. I am superintendent engineer for George H. Kitchen & Co.

Q. Are you familiar with the making and construction of boilers?

A. I have had charge of a boiler-shop.

Q. For what time?

A. Three years.

Q. Before that time were you familiar with it?

46 A. Yes, sir.

Q. While you were in the Navy?

A. Before I was in the Navy I ran boilers and had charge of them before that time.

Q. Are you familiar with the articles that are used in the manufacture of boilers?

A. Yes, sir.

Q. And familiar with the names applied to materials used in the construction of boilers?

A. Yes, sir.

Q. What are those articles, marked "Plaintiffs' Exhibits 1 and 2," you see here?

A. Boiler-tubes.

Q. What are those two articles here marked "Defendant's Exhibits 1 and 2?"

A. They are iron tubes. They are a little heavier than the ordinary boiler-tubes.

Q. Fitted for use in boilers?

A. Yes, sir.

Q. Could be used in boilers?

A. Yes, sir.

Q. What do you understand by the term boiler-tube?

A. A boiler-tube can be made of either iron, copper, or brass. It is a hole with metal around it.

47 Q. A wrought-iron boiler-tube?

A. It is made of wrought iron.

Q. Is there any special limit as to the thickness of the metal?

A. No. If you want to carry 20 pounds pressure the thickness would vary according to the pressure.

Q. What do you understand by the term flue?

A. I understand it to be a sheet of iron rolled up and riveted, pertaining to boilers. If it is built of brick it is a brick flue. If it is built of anything else it is another flue. For a boiler-flue I understand it to be made of riveted sheet-iron.

Q. Do you know any other uses to which those articles, plaintiffs' Exhibits 1 and 2, were applied besides using them as boiler-tubes?

A. Yes, sir. I have used them in a good many other cases.

Q. How were the different kinds of boilers distinguished in your business of engineering?

A. They are distinguished by flue and tube boilers.

Q. What is a flue-boiler?

48 A. A flue-boiler is built by laps and rivets, and the other is built by a continuous tube, drawn and lap-welded.

Q. And are there boilers that use both?

A. Yes, sir; that is a combination of the two.

Q. You are familiar with the flue and tubular boilers?

A. Yes, sir.

Q. Is the definition given in Webster's Dictionary, that a flue is any passage to carry hot air for the process of combustion, correct, as known to you?

(Objected to; objection sustained.)

Q. Tubes are not exclusively used for the passage of the process of combustion in water?

A. No, sir; often water is inside the tube.

Q. Have tubes of that description been largely used?

A. Yes, sir.

Q. And for that you would use plaintiffs' Exhibits 1 and 2?

A. I might make them stronger if the pressure is on the inside of the

tubes, for you press on the inside of the arch; and if it is on the
49 outside it is on the outside of the arch.

Q. Has not plaintiffs' Exhibit No. 3 been used for boiler-tubes?

A. Yes, sir; but not universally. That is what we call pipe; we would order it for pipe.

Q. But it can be used for boiler-tubes?

A. It can be; I have used it.

Cross-examined by Mr. Buel:

Q. What has been your particular line of business?

A. I am a steam-engineer; a practical engineer, and not a theoretical one.

Q. And you followed that business ever since you have been in the business?

A. For the last 25 years.

Q. Attended to that directly, I suppose?

A. Yes, sir.

Q. And nothing else?

A. Not as a business.

Q. You never have been a merchant in these articles?

A. No, sir; I have bought them, but never sold them.

Q. Do you know of those articles, Exhibits 1 and 2, being designated boiler-flues?

50 A. I never heard an engineer call them flues. I have heard them called flues by parties not familiar with engineering business. I understood what they meant when they said flues.

Q. And when you speak of the name of those articles you speak from your knowledge of engineers and engineering?

A. I speak of them as they are known in my profession of an engineer.

Q. That is what you meant by your answer to the question?

A. Yes, sir.

Q. You are a consumer of those articles, are you not?

A. Yes, sir.

You never took any pains, I suppose, to look over the price-lists and catalogues of dealers in these articles?

A. Yes, sir. I have been very much interested in it. The price affects me materially.

Q. Do you know anything about the price-list and illustrated catalogues before 1864?

A. I have been consulting them for years.

51 Q. Are Morris, Trasker & Co., and were they in 1864 and before that, large dealers in these articles?

A. I suppose they were.

Q. Were they the largest dealers?

A. I could not say as to that.

Q. Before 1864?

A. I bought a great many tubes of Prasser & Co.

Q. Before 1864 did you know of any other American manufacturer and dealer excepting Morris, Trasker & Co., and the Redding Iron Works?

A. No, sir.

Q. Can you produce a price-list or catalogue of either of those concerns before 1864, in which those articles are designated as boiler-tubes?

A. I do not know that I can. I changed my catalogue and price-list so uetime' twice a month, and I throw the old ones away, so that I will not get confused with the new ones.

Q. You have not kept any of those old ones?
A. No, sir; I have not. I want the last price.
Q. Don't you know that they were designated in these cata-
52 logues in 1864 as boiler-flues universally?
A. No, I do not know that they were.
Q. Do you know that they were not?
A. I do not. I don't know whether they were called tubes or flues.
Q. Do you know these riveted flues that you speak of; they are not articles that are bought and sold among merchants, are they?
A. No; I never saw any.
Q. They are not an article of merchandize, and were never imported to your knowledge?
A. No, sir.
Q. Do you know of any other article in trade or commerce that is known as a wrought-iron flue, excepting such articles similar to plff's Exhibits 1 & 2, in 1864?
A. I don't know them as flues, because I never have used them.
Q. You have heard them called flues?
A. Yes, sir.
Q. Have you ever heard any other article in trade or commerce called wrought-iron flues excepting those articles?
A. No. I don't know that I ever heard them called flues in commerce.
Q. Well, called wrought-iron flues anywhere?
A. No, sir.
53 Q. (Handing witness deft's Exhibit No. 1.) What do you call that article?
A. I should call that a boiler-tube. It looks to me like a boiler-tube made for the water to pass through the inside and the fire on the outside. It is thicker than an ordinary boiler-tube.
Q. That is, thicker than an ordinary boiler-tube in which the tube answers for the flue?
A. In which the tube answers for the passage of the products of the combustion inside it.
Q. When it answers that, it answers for a flue?
A. No, sir; not technically speaking or practically speaking among engineers.
Q. When these tubes are used in boilers for the purpose of conveying the product of combustion, heat, and smoke, don't they answer the same purpose as riveted flues?
A. They discharge the same functions.
Q. (Handing witness deft's Exhibit No. 1.) Is that thicker than a tube of the same diameter would be when it discharges those functions of which you have spoken?
A. Yes, sir; from the fact that the pressure comes on the inside of that instead of the outside.
54 Q. In one case the pressure is on the inside, and in the other it is on the outside?
A. Yes, sir.
Q. And you have to construct the tubes accordingly?
A. Yes, sir.
Q. And would you say the same thing about Exhibit 2?
A. That might be used either way, provided the pressure is not too great.
Q. Is that not thicker?

A. I should think that that was as strong as the other. The thickness decreases in proportion to the diameter.

Q. Supposing these were used in boilers for the purpose for which they are adapted—water—how would they be adjusted in the boiler?

A. They would be set up with an expanding tool the same as if they were reversed.

Q. Where do you buy your boiler-tubes?

A. Where I can buy them cheapest; sometimes I buy them in Boston. I am buying them at present of Morris, Trasker & Co.

Redirect:

55 Q. You said on your cross-examination, in speaking of the name of these articles, that you spoke of the name from your own knowledge as an engineer. Were you not accustomed to buy those from dealers?

A. Yes, sir. If I was ordering those, I should order them as tubes.

Q. And the same name is used by merchants with whom you deal?

A. Yes, sir.

Q. How are those tubes procured for the Navy? Did they purchase them by public advertisement?

A. Yes, sir.

Q. What did they advertise for when they wanted them?

A. For boiler-tubes, I believe. I would not be positive about that. (Objected to.)

Q. The chimney of a boiler performs the same function as a flue, does it not?

A. Yes, sir. A chimney is a flue, but a flue is not necessarily a chimney.

Recross:

Q. You say you would order these articles, or you have ordered these articles, as tubes?

A. Yes, sir.

56 Q. Have you any of the invoices that came back on these orders?

A. I never ordered them from a foreign port. I never imported them. I merely gave a carman an order to go after tubes or flues.

Q. Is that the only way you gave orders?

A. It is the only way I give them at present.

Q. You did not give orders to the importers?

A. No, sir.

Q. Or to the American manufacturers?

A. Yes, sir; I did.

Q. To whom did you give orders?

A. I have ordered from Morris & Trasker within the last year, perhaps, as tubes, to a pretty large extent. I have ordered boilers with tubes in from Charlestown.

Q. I mean tubes.

A. I have no occasion to order boiler-tubes now.

Q. You said in answer to the district attorney that you had occasion to purchase these articles?

A. Yes, sir.

57 Q. Whom did you order of in making those purchases?

A. The most boiler-tubes I ever ordered directly were from Thomas Prasser & Son, and I was then particularly in the boiler manufacturing business.

Q. From whom else did you order?
A. I ordered no boiler-tubes at that time from anywhere.
Q. What time was that?
A. When I was particularly in the boiler business.
Q. When was that?
A. It was 17 or 18 years ago.
Q. Up to 1864?
A. No, not as late as that.
Q. Up to 1864 whom did you order from besides Prasser & Son?
A. No one.
Q. Your orders were limited to Prasser & Son?
A. Yes, sir; when I worked for other parties.
Q. Sometimes you gave the order to a carman, and sometimes you gave the order direct?
A. Yes, sir.
Q. Do you know the term you employed in ordering these boiler-tubes when you made the order yourself?
58 A. It is a good while ago; and I don't know exactly the term I used then. My impression is, I ordered so many boilers-tubes of such a diameter.
Q. Describing them as boiler-tubes?
A. Yes, sir; of a certain length and a certain diameter.
Q. Do you ever recollect of ordering so many feet of tubeing of such a diameter and getting boiler-tubes?
A. No. I never ordered them in that way. They want to be a uniform length when ordered for boilers.
Q. You would always order these articles—boiler-tubes—of certain specified lengths?
A. Yes, sir; certain numbers and certain lengths.
Q. And when you would order in that way you would receive from T. Prasser & Son boiler-tubes?
A. Yes, sir.

AUGUSTUS B. WOOD sworn and examined by Mr. Davis.

Q. Where do you reside?
A. In the city of New York.
Q. What is your business?
A. My chief business is the agent of the Reading Iron Works,
59 of Reading, Penn., Seyfert, McManus & Co., proprietors.
A. Are you familiar with these articles, produced here as Exhibits 1 and 2?
A. I am, sir.
Q. Have you been for many years?
A. Yes, sir.
Q. What are they?
(Objection offered.)
A. One is a boiler-tube. Those two are boiler-tubes.
Q. Is that the name by which they are known?
A. By all the large consumers and dealers, sir.
Q. Have you ever imported them?
A. No, sir.
Q. Have you dealt in the imported article?
A. No, sir.
Q. To what extent have you dealt in like articles?
A. Largely, sir. I have been agent for that concern since the com-

mencement of their manufacturing them, and I have always done their business in New York, and have always sold what they have sold here, and the sales have been large in this city.

60 Q. By what name have those articles been ordered?

The COURT. He has answered that. He says "boiler-tubes" is the name by which they are known by all large consumers and dealers.

Q. Have you here large numbers of orders that have been made through you?

A. Yes.

Q. Who are the principal importers and dealers in this city?

A. The principal importers in this city are C. W. Whitney, Holdane, Mr. Tyng. Mr. Prasser was, but I don't think he is importing of late years very many of them.

Q. Have you got orders from those houses—Holdane and Whitney?

A. Yes.

Q. Where are they?

A. In that basket, sir.

Q. By what name were those principal importers in the habit of ordering these goods from your firm?

A. (Objection offered and sustained.)

Q. Will you looks at defendant's Exhibit No. 1, this one which Mr. Tyng declared to be a flue, and state what it is.

A. It is a boiler-tube, sir.

61 Q. Of what is it a part? what was it taken from?

A. It is cut from the end of a tube, out of a lot which I furnished for the Collins line of steamers—the Baltic & Atlantic and the rest.

Q. That is the kind of tube used in their boilers?

A. Yes, sir; I furnished them largely for those steamers, & that is cut from one of them.

Cross-examined by Mr. Buel:

Q. When used in the Collins steamers, did that tube hold the water?

A. I am not sure whether the water was through it or around it. I forget about the construction of their boilers. They are used for both purposes. They are used promisc'ously for that purpose. I do not remember whether the water was inside or outside.

Q. Do you say that these articles, No. 1 and 2, were known among the principal dealers in 1864 and before that time as wrought-iron tubes?

A. Yes, sir.

Q. Who were the principal dealers in 1864 and before that

62 time in this country? the largest manufacturers?

A. The largest manufacturers are Morris, Trasker & Co., Seyfert, McManus & Co. Those were not the parties I referred to as dealers.

Q. I think there were in the market the other kind of boiler-tubes, as you call them in 1864 and before that time?

A. I think they were.

Q. Had you published price-lists before 1864?

A. Yes, sir.

Q. Is that one of your price-lists published in 1862? (List shown witness.)

A. I should think it was, sir; it has the appearance of it.

Q. Is the article described in that price-list as "lap-welded boiler-flues" the articles represented by those exhibitors?

A. Identically the same articles. (Put in evidence, marked "Exhibit No. 28.")

Q. Do you recognize that as one of your price-lists from the manner of its getting up? (Handing another price-list to witness.)

A. I should think it was. I has the appearance of it.

Q. And the term boiler-flues represents the article you call boiler-tubes?

63 A. It is the same as the other one. It is a mere repetition of the other one.

Q. Is that a private list of Seyfert, McManus & Co.

(Objection offered.)

A. It is not my price-list.

The COURT. Ask him what it is.

Q. What is that?

A. It purports to be—

The COURT. No; what do you recognize it as, if you have any knowledge? We can any of us read it; but can you identify it and tell where it came from?

A. I should not like to—I am agent for Seyfert, McManus & Co.—as this is represented as being issued by them.

Q. Have you any doubt that it is their price-list?

A. I don't know.

Q. Have you any doubt?

A. How should I know? I do not know anything about it, and my doubts do not come in until I know something.

Q. Have you any doubt whether that is a price-list of Seyfert, McManus & Co.?

A. I don't choose to answer the question until I am obliged to.

64 If you want my doubts I can give them, but I decline to answer it until I am obliged to answer it. If the judge says I am required to answer it, I will.

Q. What are your relations now to Seyfert, McManus & Co?

A. I am agent for Seyfert, McManus & Co.

Q. Where are the works of Seyfert, McManus & Co?

A. Reading, Penn.

Q. Are you their principal or sole agent in New York?

A. Yes, sir.

Q. The sole agent?

A. Yes, sir.

Q. Who compose the firm?

A. That firm has been composed of a variety of persons that are not now in it; it has been changed.

Q. Who is it composed of now?

A. It is composed of William N. Seyfert, or, rather, it is a stock company now.

Q. Are you a member of that company?

A. No, sir; I am not.

Q. Are you a stockholder of that company.

A. No, sir.

Q. When did it become a stock company?

A. I forget the number of years ago. It was chartered by the legislature of Pennsylvania.

Q. When?

A. I should think it was ten years ago.

Q. About 1861?

65 A. I don't recollect the time. I should think it was about that time.

Q. Before that time was it a firm?

A. Yes, sir; it is continued now under the same firm.

Q. Who composed the firm before it became a company?

A. The two Hunters, Mr. Seyfert, and Mr. McManus. Those are the four original parties.

Q. Were you a partner of that firm?

A. No, sir.

Q. How long have you been their agent here in this city of New York?

A. About 23 or 24 years.

Q. You sell the articles that they manufacture and advertise them, do you?

A. Not altogether. They manufacture goods that I don't sell—that this is not the market for.

Q. Do you sell some of the articles they manufacture and advertise?

A. Yes, sir.

Q. The articles which you designate as boiler-tubes which they manufacture you sell?

A. Yes, sir.

66 Q. Now I ask the question again, if you have any doubt whether that is a price-list of Seyfert, McManus & Co.?

(Objection offered.)

The COURT. If he can identify that as one of their price-lists he may do so.

Q. Can you identify that as one of their price-lists?

A. No, sir.

(Mr. Buel offered the paper which had been marked No. 9, and which was dated June 1st, 1865, in evidence.

Objection offered and overruled:

Mr. Buel offered in evidence Exhibit No. 10, a similar price-list.)

Q. Where is your office?

A. My present office is No. 57 Maiden Lane.

Q. Have you got a sign on your store, "Lap-welded iron boiler-flues"?

A. I think it is very likely I have, sir.

Q. Does that sign advertise those same articles?

(Objection offered.)

A. Yes, sir.

Q. On the same sign is there "steam, gas, and water pipes?"

67 A. I think there is something of that kind.

Q. Does that fairly represent the sign?

(Paper shewn witness.)

A. I think it is likely it does. I have had that sign up a great many years, and I think likely that is it, sir.

(Exhibit shewn witness.)

Q. Look at this article, Exhibit No. 3; what is that?

A. As it lies there on the floor it is a pipe.

Q. Does that come under the head of "steam, gas, and water pipes?"

A. It would under some circumstances, and under others it would not.

Q. If sold at all from your establishment under any words expressed in that sign, it would come under the head of "steam, gas, and water pipe?"

A. We sold it for a good many purposes. We sold it for that and a

good many other purposes. What I mean to say is, that it is not used for that exclusively.

Q. I also meant what you call it?

A. We call it a pipe.

68 Q. If a person came in and asked for pipe you would give him that?

A. If a person came in and asked for pipe, I should want to know what kind of pipe he wanted. It might be he wanted a smoking-pipe. If we knew what the party wanted it for, then we would shew it to him. If it was for any purpose for which they ordinarily use pipe we would show that to him.

Q. If a stranger came in and asked for pipe, would you shew him something like that?

A. He might want gas iron pipe. I should probably ask him the question. If a man should ask me for what that name designates, steam, gas, and water pipes, I should be likely to shew him that.

Q. If he asked you for a "steam, gas, or water pipe," you would not show him the other article, (plaintiffs' Exhibit' 1 and 2?)

A. No, sir.

Q. Are articles of this description, Exhibit 3, upon the price-

69 list and catalogues in the trade, a separate and distinct article from Exhibits 1 and 2?

A. Yes, sir.

Q. A different description throughout?

A. A different description.

Q. Are articles like Exhibit No. 3, called wrought-iron tube, as well as pipes?

A. Well, sir, they are properly a tube, but they are not ordinarily called tubes. They are ordinarily called pipes. Anything of that kind I should call a tube if I were going back to geometry in the matter; but if you ask me what it is called in the ordinary acceptation of the term in the trade, I should say a pipe.

Q. Anything of that shape you would call a tube, wouldn't you?

A. No, sir; I did not say any such thing.

Q. Do you know of any other article in the trade known as, or called wrought-iron flues, but such articles as plaintiffs' Exhibit' 1 and 2?

A. The other article which I regard as a boiler-flue is ordinarily

70 made by the parties using and consuming them.

Q. Is there any other article of merchandise or importation of your knowledge that is termed a wrought-iron flue, excepting articles similar to Exhibits 1 and 2?

A. I never heard them called a flue by the importer. I know the importers don't call for flues to me.

Q. Have you not heard articles of that description designated as boiler-flues?

A. Yes, sir; I designate them myself as boiler-flues.

Q. Have you ever designated any other article as a wrought-iron flue, excepting articles similar to that?

A. I don't deal in the other article, and how could I designate it? You asked me if I dealt in any other article which I designated boiler-flues.

Q. Have you ever designated any other article of trade on price lists, or in any other way, as a wrought-iron flue, excepting articles similar to Exhibits 1 and 2?

71 A. No; because I only deal in those things; why should I designate them?

Q. Have you ever designated any other article as wrought-iron flue, excepting articles similar to Exhibits No. 1 and 2?

A. In speaking of it I should certainly designate it differently. I don't deal in it. I do call another article a flue, but I don't deal in them. I want you to confine your question to something I deal in.

Q. Did you ever deal in any other wrought-iron flues?

A. No, sir; I never dealt in them.

Q. Or any other article which you would call flues?

A. No, sir; I do not deal in the article that I would call, properly speaking, a flue.

Q. Do you know any others in the trade who deal in articles which would call, properly, flues, excepting articles such as that?

A. I would rather not answer such questions, but leave it to the persons themselves.

Q. Can you name any one now who ever sold any other wrought-
72 iron flues, excepting articles similar to plaintiffs' Exhibits 1 and 2?

A. The other articles I referred to were also made by the parties using them, and have not been bought or sold to my knowledge, although they have been used to a very large extent.

Q. Do you recollect when this question of duties was before the Treasury Department?

A. Yes, sir.

Q. Do you remember the fact that evidence was submitted to the Treasury Department on behalf of the importers and the American manufacturers on this question as to the proper rate of duty?

A. I recollect there was evidence submitted to the Secretary of the Treasury.

Q. Did Morris, Trasker & Co., and Seyfert, MacManus & Co., take part in those representations before the Treasury Department?

(Objection offered and sustained.)

Q. Did you yourself furnish evidence to Morris, Trasker & Co., or to their counsel, to submit to the Treasury Department?

73 A. Is that a proper question for me to answer?

The court. I think it is.

Mr. Davis. We have no objection.

A. I accompanied Seyfert, McManus & Co., or one of the firm, and also Morris & Trasker were represented there; and I accompanied them to assist the parties who were trying to furnish testimony to the Secretary of the Treasury.

Q. Were those gentlemen represented by counsel at that time?

(Objection offered and sustained.)

Re-direct by Mr. Davis:

Q What did you furnish? You say you furnished evidence.

(Objection offered and sustained.)

Q. For what purpose are these tubes, Exhibits 1 and 2, sold as well as for boiler-flues?

A. I sell them for a good many purposes. I have sold them for bolting passenger-cars, sir. You can hardly think of all the uses they are put to. I have sold them for heating buildings; that is another
74 business; and for artesian-well tubing, for salt-well tubing, and oil-well tubing. I sold them under different names for locomotives, large-sized ones as water-pipes; some as making the water-connection where they conducted the water from the tank to the locomotive, and for sand-pipes, and grate-bars, and hand-rails. I have sold them for awning-posts.

Q. You have sold them for a great variety of purposes as well as for boilers?

A. Yes, sir.

Q. You have been shewn a price-list in which you spoke of them as boiler-flues. Will you explain why they are so called in that price-list?

A. Simply as a matter of convenience.

Q. Was it anything more than to communicate this, you kept that kind of tubes that were used in boilers, and sometimes called boiler-flues?

A. That was all. It was a matter of convenience.

Q. Have you known the imported article of this kind to be used also for oil-wells?

75 A. Yes, sir.

Re-cross by Mr. Buel:

Q. When you sold these articles for oil-wells, were the articles any different from the articles used for boilers?

A. Which ones do you allude to, sir?

Q. I mean what you advertised as flues.

A. Do you mean what we call oil-well casing? Oil-tubes and oil-well casing are both the same thing. That is what I call boiler-tubes, that article. It is not of course that shape, for of course there had to be different work to it. They simply have a socket put on.

Q. With threads?

A. Yes, sir.

Q. Are they thicker?

A. No, sir, nor thinner. They are the identical thing. What I mean to say is that they are just like that. We have two lists sometimes, and make them heavier.

Q. Do you mean to say that with that diameter you would not

76 make the casing thicker than in this Exhibit No. 1?

A. No, sir; unless they ordered it heavier, and then we should.

Q. Didn't they order it heavy for oil-well casing commonly?

A. No, sir; ordinarily not.

Q. You would cut a thread on precisely that article?

A. Precisely that article.

Q. You would not cut what you call a standard thread?

A. Yes, for that business. There is a standard thread for that business.

Q. You would cut what you call a standard thread, then?

A. I don't know what you mean. If you mean a standard thread for that business, I should. In other words, the thread for that is different from the thread on what I call pipe. We can make it of any thread if we are only paid for it. We can make different threads on there. We will make them to order.

Q. What is the ordinary diameter of the oil-well casing?

77 A. There is a diameter of 3½ inches, outside diameter, which is the size very largely used, and a variety of other sizes, but that might be called the leading size.

Q. What do you sell 3½ inch diameter boiler-tubes, as you call them, per foot?

A. I forget the price.

Q. What do you sell them for to-day?

A. We have a list price, but I forget exactly what the list is to-day. It keeps constantly changing. I have no doubt you have got it there. I have not got a list with me, and on my word I cannot tell the price.

Q. Is not there a difference between the price per foot between the articles you sell for oil-well casing of 3½ inch diameter and the articles you sell for boiler-tubes 3½ inch diameter?

A. Certainly, there is a difference in price.

Q. How much difference?

A. I don't recollect, sir. All we can get ordinarily.

Q. You know that is not an answer to my question.

78 A. The 3½ inch for oil-well casing, I think, is 66 cents; 3½ inch boiler-flues, I think, are 50 cents, or thereabouts. But that don't tell anything, because that is not all the prices.

Q. (By the court.) You say you sell the identical thing for boiler-tubes and for oil-well casings. To what is the difference in price owing?

A. The difference in price is owing mainly to their having screws put on them and sockets put on them.

JOHN C. FLOGGLER, called for defendant, being duly sworn.

Examined by Mr. Davis:

Q. Where do you reside?

A. In Boston.

Q. What is your business?

A. I am an iron merchant, also connected with a manufactory there.

Q. How long have you been in the business as a merchant?

A. I have been in the iron business about 18 years.

Q. Have you imported tubes?

79 A. Very largely, sir.

Q. Have you seen Exhibits 1 and 2?

A. Yes, sir.

Q. Have you imported that article?

A. Yes, sir.

Q. From where?

A. From England and Scotland.

Q. And of course you have sold it largely?

A. Yes, sir; very largely; the largest, probably, of any one in this country.

Q. By what name has it been, prior to 1865, imported and sold?

(Objection offered as far as importation is concerned.)

Q. Under what name have you imported and sold this article prior to 1865?

(Objection offered to the portion of the question relating to importation as immaterial.)

The COURT. I think I have uniformly required you, after learning the condition of the witness and his knowledge on the subject, to put general questions, by what name it was imported and sold before 1865.

80 Q. By what name has this article been imported and sold in this country?

(Objection offered to the question so far as it inquires of the imported article. Objection overruled; exception taken.)

A. It was always imported and sold as an iron boiler-tube by every importer in the country.

Cross-examined by Mr. Buel:

Q. Do you mean to swear that that article was sold by every importer in the country under the name of boiler-tubes?

A. I don't think there is a case anywhere where they did not sell them as a tube—an iron tube.

Q. Did not they sell them as flues?
A. I never heard of their being sold as flues.
Q. Where do you reside; in Boston?
A. Yes, sir.
Q. Have you always lived there?
A. No, sir.
Q. Did you ever do business in New York?
A. Yes, sir.
Q. When?
A. I was connected with a firm in New York and also in Boston up to 1867, I think, sir.

81 Q. When did you reside and do business in New York?

A. I made my home both in Boston and New York up to 1867. I have staid in Boston permanently from that time up to the present.

Q. Do you mean to say that you are well acquainted with the business of other importers in the city of New York; that you are willing to state on oath that they sold these articles uniformly as boiler-tubes and not as boiler-flues?

A. I never heard an instance, sir, where an importer, previous to 1865, ever sold these tubes as flues, in my life. It was the common name for the dealers and the importers.

Q. You mean to say that the usage among importers in dealing with the American market was uniformly to call them tubes?

A. Yes, sir.

Q. You have heard the name "boiler-flues" applied to these articles as early as 1864, have you not?

A. Yes, sir.

Q. In the trade?

A. Not in the trade; no, sir; not usually.

82 Q. Not at all?

A. I have heard the name; I have heard them called as flues.

Q. Have you ever seen them named in any price-lists as boiler-flues?
A. I might have seen them, but I have no particular recollection of it.
Q. Do you know the establishment called the Reading Iron Works?
A. Yes, sir.
Q. Were they large dealers before 1864?
A. Yes, sir.

Q. Did you ever see any of their price-lists in which they called them boiler-flues?

A. I don't think I ever saw any of their price-lists.

Q. How is it with the firm of Morris, Trasker & Co.; were they large manufacturers?

A. Yes, sir.

Q. Have you ever seen their price-list in which they call them flues?
A. I have seen their price-lists.

Q. Morris, Trasker & Co. manufactured and sold large quantities of these articles, did they not?

A. Yes, sir.

83 Q. Don't you know they call them flues in their price-list and catalogue?

A. They have called them both, I think. I have seen them where they call them tubes and where they call them flues.

Q. You have seen them where they call them flues?
A. Yes, sir.

Q. Have you ever seen, previous to 1864, any price-list in which that firm called them tubes?

A. I have no recollection of ever seeing their price-lists prior to 1864 where they called them anything.

Q. Have you ever been at their works?

A. Yes, sir.

Q. Do you recollect seeing a sign on their works, "boiler-flues"?

A. No, sir.

Q. Do you mean to say it is not there? Do you mean to say that there is not a sign, "boiler-flues"?

A. Not that I ever saw there.

84 Q. Have you looked for it?

A. Yes, sir.

Q. Do you mean to say it is not there?

A. It may be there, but I never saw it.

Q. You have heard that they manufactured an article called "boiler-flues"?

A. Yes, sir.

Q. I suppose if you were to receive an order in your business for 50 boiler-flues, three inches diameter, you would understand precisely what article the purchaser wished, wouldn't you?

A. Yes, sir.

Q. And with what article would you fill that order?

A. Fill it with 3-inch boiler tubes.

Q. You would not fill it with gas-pipe?

A. No, sir.

Q. Nor steam-pipe?

A. No, sir.

85 Q. Or water-pipe?

A. No, sir.

Q. Do you know of any other article that has been imported that has been designated a wrought-iron flue by any parties excepting articles similar to plaintiffs' Exhibits 1 and 2?

A. No, sir.

Q. Or any other article of merchandise bought and sold as a wrought-iron flue excepting articles similar to plaintiffs' Exhibits 1 and 2?

A. No, sir.

Q. What is the name of the company you are connected with?

A. The National Tube-Works Company.

Q. How long has it been in existence?

A. Going on three years.

Q. Do they manufacture and sell what you term wrought-iron tubes—boiler-tubes?

A. Yes, sir.

Q. Do they manufacture and sell what you call wrought-iron pipe for oil, salt, and gas wells?

A. Yes, sir.

Q. Are those two distinct articles on their price-list?

86 (Objection offered.)

Q. Is this a price-list of the National Tube-Works, (list shown witness?)

A. Yes, sir.

Counsel for the plaintiffs thereupon, at the close of the testimony, duly requested the court to make the following findings:

That at and before the times of the passage of the said several tariff acts of 1864 and 1865 there were not in the markets of the United States any other articles of merchandise or importation made of wrought iron known, called, or used as flues, excepting articles similar to those

imported by the plaintiffs in this case, and that the term flues in said tariff act of 1864 applied to and embraced such articles as plaintiffs imported, as aforesaid.

87 The court refused so to find and decide, and counsel for plaintiffs thereupon duly excepted to such refusal.

That articles like those imported by the plaintiffs were not made or known in the markets of the United States until subsequently to the passage of the tariff act of August 30, 1842.

The court refused so to find and decide, and counsel for the plaintiffs thereupon duly excepted to such refusal.

Counsel for the plaintiffs thereupon then and there duly requested the court to find and decide as follows:

First. That the term "tubes" in the amendatory tariff acts of March 3d, 1865, aforesaid, has no other, broader, or different meaning than the same term in the act amended, to wit, the said tariff act of June 30th, 1864.

88 The court refused so to find and decide, and counsel for plaintiffs thereupon duly excepted to such refusal.

Second. That the term "tubes," as used in the said tariff act of March 3d, 1865, does not embrace articles of the class, character, and description of those imported by the plaintiffs as aforesaid.

The court refused so to find and decide, and counsel for plaintiffs thereupon duly excepted to such refusal.

Third. That the proper duty upon the articles imported by the plaintiffs as aforesaid, as fixed by the said tariff act of 1864, was 2½ cents per pound, and this rate of duty is not increased or affected by said tariff act of 1865. The court refused so to find and decide, and counsel

89 for plaintiffs thereupon duly excepted to such refusal.

Fourth. That the plaintiffs are entitled to judgment for two hundred dollars.

The court refused so to find and decide, and counsel for plaintiffs thereupon duly excepted to such refusal.

The court thereupon ordered judgment for the defendant, and counsel for the plaintiffs thereupon duly excepted to such decision, finding, or order.

And counsel for plaintiffs did thereupon then and there duly propose the aforesaid exceptions to the findings, decisions, and rulings of the said circuit judge, and request him to put his seal to this bill of exceptions containing the said several exceptions as aforesaid according to the form of the statutes in such case made and provided, and there-

90 upon said circuit judge, at the request of the said counsel for the plaintiffs, did put his seal to this bill of exceptions pursuant to the aforesaid statutes in such case made and provided, on the 12th day of June, 1871, (the same having been drawn and settled by the attorneys of the respective parties, and agreed to as by the stipulation endorsed hereon September, 1873.)

L. B. WOODRUFF, [L. S.]
Circuit Judge.

It is hereby stipulated that the within be deemed the bill of exceptions in this case, and settled as such; and that the same be signed accordingly by the judge who tried the cause without further notice.

Dated September, 1873.

GEORGE BLISS,
U. S. Attorney for Defts.
BUEL & ERHARDT,
Plffs. Attys.

91 (Indorsed :) U. S. circuit court. Second circuit, southern dist. of N. Y. Charles R. Tyng and Lawrence Y. Hopkins vs. Moses H. Grinnell. Bill of exceptions. Buel & Erhardt, plaintiffs' attorneys, 247 Broadway, New York City. Filed Sept. 27th, 1873.

92 Supreme Court of the United States.

CHARLES R. TYNG AND LAWRENCE Y. HOPKINS *agt.* MOSES H. GRINNELL. } In error.

Of October term in the year of our Lord one thousand eight hundred and seventy-three.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Charles R. Tyng and Lawrence Y. Hopkins, by their attorney, Charles Donohue, and say that in the record & proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Moses H. Grinnell against the said Charles R. Tyng and Lawrence Y. Hopkins, whereas by the law of the land, the said judgment ought to have been given for the said Charles R. Tyng and Lawrence Y. Hopkins against the said
93 Moses H. Grinnell; and the said Charles R. Tyng and Lawrence Y. Hopkins pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

CHARLES DONOHUE,
Attys. for Plffs. in Error.

(Endorsed :) U. S. Supreme Court. Charles R. Tyng & al. agt. Moses H. Grinnell. Assign't of errors. Chas. Donohue, atty. for plff. Filed Oct. 11, 1873.

94 *Bond for costs.*

Circuit court of the United States of America, for the southern district of New York, in the second circuit.

CHARLES R. TYNG ET AL., PLFFS. IN ERROR, *vs.* MOSES H. GRINNELL, DEFT. IN ERROR. }

Know all men by these presents that we, Charles R. Tyng, Alfred Earnshaw, and Thomas M. Tyng, are held and firmly bound unto the above-named Moses H. Grinnell in the sum of five hundred dollars, to be paid to the said deft. in error, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the second day of October, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas the above-named plaintiffs in error have prosecuted a writ of error to the Supreme Court of the United States to reverse the judg-

ment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named plaintiffs in error shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their said judgment good, then this objection shall be void; otherwise the same shall be and remain in full force and virtue.

C. R. TYNG. [L. S.]
ALFRED EARNSHAW. [L. S.]
T. M TYNG. [L. S.]

Sealed and delivered, and taken and acknowledged, this 2d day of October, 1873, before me, as to C. R. Tyng and Alfred Earnshaw.

JOHN A. SHIELD,
U. S. Commissioner, Joy, N. Y.

Sealed & delivered & taken and acknowledged this 3d day of Oct., 1873, as to Thos. M. Tyng.

JOHN A. SHIELD,
U. S. Commissioner, Joy, N. Y.

95 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Alfred Earnshaw, of Dobbs' Ferry, Westchester County, State of New York, being duly sworn, doth depose and say, that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

ALFRED EARNSHAW.

Sworn to this 2d day of Oct., A. D. 1873, before me.

JOHN A. SHIELD,
U. S. Commissioner, Joy, N. Y.

UNITED STATES OF AMERICA,
Southern Dist. of New York.:

Thomas M. Tyng, of 209 East 16th st., New York City, being duly sworn, doth depose and say that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

T. M. TYNG.

Sworn to this 3d day of October, A. D. 1873, before me,

JOHN A. SHIELD,
U. S. Commissioner, Joy, N Y.

The within approved. Oct. 4, 1873.

GEO. BLISS,
U. S. Atty. for Deft.

The within bond is approved. October 7th, 1873.

SAM'L BLATCHFORD, *D. J.*

(Indorsed:) Vol. , page , U. S. circuit court. Chas. R. Tyng, plff. in error, vs. Moses H. Grinnell, deft. in error. Bond for costs on appeal. Buel & Erhardt, attys. for plffs. in error. Filed this 7th day of Oct. 1873.

96 By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To MOSES H. GRINNELL, defendant in error:

Whereas Charles R. Tyng and Lawrence Y. Hopkins, the plaintiffs in error, have brought and presented a writ of error, lately issued out of

the Supreme Court of the United States, and said writ of error directed to the judges of the circuit court of the United States for the southern district of New York, second circuit, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said circuit court before, the judges thereof, between the said Charles R. Tyng and Lawrence Y. Hopkins, plaintiffs in error, and Moses H. Grinnell, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff;

97 And whereas, for the correction of that error in due manner, the said writ has been issued returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the second Monday of October, 1873:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October, 1873, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the .

SAM'L BLATCHFORD.

98 (Indorsed:) U. S. circuit court, southern district of New York. Charles R. Tyng & als., plffs. in error, vs. Moses H. Grinnell, deft. in error. Filed Oct. 7, 1873.

I admit due service of a copy of the within citation. Oct. 7, 1873.

GEO. BLISS, *Deft.'s Atty.*

(Indorsement on cover:) No. 296. Charles R. Tyng and Lawrence Y. Hopkins, plaintiffs in error, vs. Moses H. Grinnell. S. New York. C. C. U. S. Filed 21st October, 1873.

REC. 296—3

Bond & Tinsley, Printers, 379 Pearl St., N.Y.

In the Supreme Court

OF THE UNITED STATES.

October Term, 1873. No. 296.

CHARLES R. TYNG et al.,
Plaintiffs in error,
vs.
MOSES H. GRINNELL,
Defendant in error.

Brief for Plaintiffs in Error.

STATEMENT.

This suit was brought to recover for an excess of duties on certain invoices of "wrought-iron flues," illegally exacted by defendant as Collector of the Port of New York, and paid by plaintiffs under protest.

To the declaration, defendant pleaded the general issue. (Fol. 8.)

The case was tried at a Circuit Court for the Southern District of New York, June 12, 1871, before his Honor the Circuit Judge, without a jury. (Fol. 16.)

It was proved on the trial, and found by the Court, that the plaintiffs imported and entered the articles of merchandise in question at the port of New York, in December, 1869, as wrought-iron flues, and claimed that duty should be charged thereon at the rate of but 2½ cents per pound, pursuant to the tariff act of June 30, 1864; but that they were classified and ap-

praised, by direction of defendant (who was Collector of the Port) as "wrought-iron tubes," and the duties were liquidated thereon at 3½ cents per pound; defendant claiming that the articles in question were subject to such rate of duty under the tariff act of March 3d, 1865. Plaintiffs duly appealed to the Secretary of the Treasury from this exaction and decision on the part of defendant, and upon the affirmance of such exaction and decision, brought this suit within the time allowed by law. The excess of duties (beyond 2½ cents per pound) so paid by plaintiffs, under protest, amounted to $173.36 in gold, which—at the time of the trial—with interest, and premium on gold, amounted to $200 currency. (Fols. 10, 11.)

It was farther proved on the trial, and the Court found in substance, that, at the time of the passage of the tariff acts of 1864 and 1865, such articles as plaintiffs had imported were articles of merchandise and importation, and that "by far their greatest and most extensive use" was for flues in steam boilers, and when "ordered from manufacturers in the United States, or by manufacturers of boilers from an importer in the United States for such purpose, they were called 'flues;'" and that these articles have a peculiar construction with reference to their principal use—i. e., they are "lap-welded" instead of being "butt-welded." (Fols. 21, 22.)

The evidence in the case farther establishes, without conflict or dispute, that, at and before the time of the passage of the tariff acts of 1864 and 1865, there were not in the markets of the United States—or elsewhere—any other articles of merchandise or importation made of wrought-iron, known, called or used as "flues," excepting articles of the kind imported by plaintiffs.

Every witness (on either side) examined upon the subject states this to be the fact. The entire testimony in any way relating to this point is embraced in the Record. (Fols. 25, 26.)

The part of such testimony which actually refers to the point is very brief. Subjoined is a reference to everything said by each witness upon the subject:

Thomas M. Tyng, fols. 26, 27.
T. F. Rowland, fol. 28.
J. G. Harrison, fol. 28.
W. W. Vanderbilt, fol. 44.
J. L. Peake, fol. 52.
A. B. Wood, fols. 70, 71, 72.
J. C. Floggler, fol. 85.

The evidence also establishes, without conflict or contradiction, that articles similar to those imported by plaintiffs were not made or known in this country until the year 1847 or 1848. (Fol. 25.)

The term "tubes" first appears in the tariff acts in 1842; and the term "flues" first appears in the tariff of 1861.

5 Stat. at Large, at p. 551.
12 id., at p. 181.

The plaintiffs allege, as error in the admission of testimony, that the Court below erred in allowing the witness Floggler to testify by what name the articles in question were *imported* prior to 1865, for the purpose of proving the commercial designation of the articles; plaintiffs claiming that the testimony objected to was not admissible to prove commercial usage, or for any purpose relevant to the issue in this case. (Fols. 79, 80.)

Plaintiffs allege, as errors in the findings of the Court, and in its refusals to find:

First—That the Court found and decided that the articles in question were wrought-iron "tubes"

within the meaning of the amendatory tariff act of March 3d, 1865, and were subject to the duty imposed of 3½ cents per pound; and that it accordingly gave judgment for defendant.

Second—And that the Court refused to find and decide, on the other hand, that said articles were wrought-iron "flues" within the meaning of the tariff act of June 30th, 1864, and subject to a duty of but 2½ cents per pound; and that this duty was not increased by the amendatory act of 1865; and that the Court refused to give judgment accordingly for plaintiffs.

POINTS.

With reference to the admission of testimony as to commercial usage:

The Court below erred in admitting the testimony of the witness Floggler, objected to by plaintiffs.

Usage in the American market (in cases where such usage is susceptible of proof) is alone material and controlling in the construction of tariff acts.

Usage in the custom house (based on foreign invoices and entries conformed thereto) before the goods have actually reached the home market, is wholly immaterial.

U. S. *v.* 200 chests of tea, 9 Wheat. 430.
Curtis *v.* Martin, 3 How. 106.
Roosevelt *v.* Maxwell, 3 Blatch. 391.
Crocker *v.* Redfield, 4 Blatch. 378.

It is very evident that the testimony objected to had controlling weight in the decision of the question of commercial usage in this case at the Circuit Court. (Fol. 20.)

Upon the whole record, with the exceptions to findings and refusals to find, the following points are respectfully submitted:

I.—The tariff act of June 30, 1864, Sec. 3, makes the duty on "steam, gas and water tubes and flues, of wrought iron, two cents and a half per pound."

13 Stat. at Large, 204.

The act of March 3, 1865, lays an additional duty on "tubes," as follows:

"On wrought iron tubes, one cent per pound."

13 Stat. at Large, 493.

This leaves the duty on wrought iron *flues* 2½ cents per pound.

The proper punctuation is better observed in the corresponding enumeration in the preceding tariff—the act of July 14, 1862:

"On steam, gas, and water tubes, and flues of wrought iron, one fourth of one cent per pound." (Additional duty.)

12 Stat. at Large, 545.

The section in question in this case, when distributed, so as to specify more distinctly the articles enumerated, would read as follows:

On steam, gas, and water *tubes* of wrought iron, and on *flues* of wrought iron, two cents and a half per pound.

Thus the act of 1864 makes "flues" a separate article of taxation, and distinguishes them from "tubes."

(1) It cannot rationally be maintained that "tubes" mean the same thing as "flues" in the act of 1864.

As said by the Supreme Court in Maillard *v.* Lawrence: "Such a construction would render the member of the sentence immediately following, and connected with the former by the copulative conjunction, * * altogether absurd and wholly inoperative."

16 How., 251.

(2) If synonyms were intended, "*or*" would have been used—not "*and.*"

Thus tubes are nothing more nor less than *pipes* for steam, gas and water.

And so in the tariff of 1842 a duty of 5 cents per pound is laid "on steam, gas or water tubes *or* pipes, made of band or rolled iron"—the one term being convertible with the other—"*tubes*" being the more technical or accurate—"*pipes*" the more popular designation.

5 Stat. at Large, 551.
Record, fols. 68, 69.

II.—The term "tubes" in the amendatory act of 1865, must be construed to have no more comprehensive, and no different meaning, than the term "tubes" in the act amended—*i. e.*, the act of 1864.

(1) The two acts are "*in pari materia.*" Indeed by a *series* of acts, to wit, the act of March 2, 1861, and the acts of July 14, 1862, and June 30, 1864, (all cited *supra,*) employing the same phraseology, "tubes" acquired a meaning in the tariff acts as distinguished from "flues."

(2) In what way could Congress have gone to work to increase the duty on *tubes* and *not* on flues—excepting by specifying the former and omitting the latter?

According to the defendant's theory, if the amendatory act of 1865 had named both *tubes and flues*, the two words and the copulative conjunction would have expressed no more than the words tubes alone.

(3) The logical and legal inference from the omission to carry the term "flues" into the amendatory act of 1865, is that it was not intended to increase the duty on flues.

Homer *vs.* The Collector, 1 Wall, 486.
Coggil *vs.* Lawrence 1 Blatch. 602.
Roosevelt *vs.* Maxwell, 3 *id.* 391.

III.—Conceding that in a *generic* sense, "tubes" embrace all hollow cylinders or all long hollow bodies (Worcester), yet as the tariff has singled out and designated a specific class, "flues," articles of merchandise known or used in the American market as "flues" are, in the application of the law, to be distinguished from "tubes."

Tariff acts constantly select out a *species* from the *genus*, and thus make it, for the purposes of the law, a distinct article.

Homer *vs.* The Collector, 1 Wall, 486.
U. S. *vs.* 200 chests of tea, 9 Wheat., 430, and at pp. 438.
Elliott *vs.* Swartwout, 10 Peters, 137.
Lennig *vs.* Maxwell, 3 Blatch., 125.
Thorp *vs.* Lawrence, 1 *id.*, 351.
Boving *vs.* Lawrence, 1 *id.*, 607.

IV.—The articles imported by plaintiffs, in question in this case, were "flues" within the meaning of the tariff act of 1864, and their proper classification as flues is unaffected by the amendatory act of 1865.

(1) If commercial nomenclature or usage of terms is of any weight in this case, it is submitted that the only usage of any importance—*i. e.*, usage in the American market—after the goods have passed the custom house, designated these articles as "flues."

Record, fol. 21.

(2.) But the terms used in the act in question are not to be construed in any restricted sense—whether technical or commercial—but according to their "popular or received import."

The language employed is *descriptive*, and is concerned about the *thing*, and not about the mere *name*.

In using the term "flues," Congress intended articles of merchandise used for flues, and made for use as flues.

"Flues" are passage-ways for or conductors of the products of combustion—heat, flame and smoke. The word has always had this very restricted meaning, both in common acceptation and in commercial and scientific application.

See definition in standard General Scientific Dictionaries.

It was found by the Court below, and is undisputed, that wrought-iron flues are constructed for use as flues in steam boilers—i. e., "to conduct the products of combustion through the boiler, and contribute to heat the water contained therein." (Fols. 21, 22.)

It was also found by the Court that the articles imported by plaintiffs were designed and constructed for flues, and were principally used as flues. (*Id.*)

They *are* flues, then, within the meaning of the act.

Maillard *v.* Lawrence, 16 How. 251.

It is immaterial that these articles are sometimes used for other purposes.

Their primary and principal use is as flues. Their exceptional use for other purposes does not make them the less flues.

Maillard *v.* Lawrence, (supra.)
Dallet *v.* Smythe, 6 Blatch., 419.
Schneider *v.* Lawrence, 3 Blatch., 115.

(3.) The tariff act of 1864 calls for articles of merchandise designated therein as "wrought-iron flues."

Articles such as plaintiffs imported answer that call, and no other articles do.

That construction should be given to the act, which gives operation to all its terms.

Potter's "Dwarris on Statutes," 189.
Nelson J., in Thorp *v.* Lawrence, 1 Blatch., 353, 354.

(4.) Upon the foregoing facts—the undisputed evidence—the Court below should have found that the term "flues" in the act of 1864 applied to the articles imported by plaintiffs.

And the Court should have farther found, (if the construction maintained by plaintiffs in Points I., II. and III., is sound,) that this classification of the articles in question was unaffected by the act of 1865.

V.—Since the trial of this case at the Circuit (in June, 1871,) the Supreme Court has, by its decision in the case of Reiche *v.* Smythe, laid down a rule of construction which covers and should control the case at bar.

13 Wall, 162.

It was upon the decision of Reiche *v.* Smythe by the learned Circuit Judge, in May, 1870, (7 Blatch., 235,) that the present case was decided at the Circuit, by the same Judge, in June, 1871. The cases cannot be distinguished in principle.

And the rule having been reversed in the former case, we respectfully claim the benefit of the rule as now settled by this Court.

The judgment should be reversed, and a new trial ordered.

Charles Donohue

Of Counsel for Plaintiffs in Error.

Bond & Tinsley, Printers, 379 Pearl St., N. Y.

U. S. Supreme Court,

OCT. TERM, 1875.—No. 78.

TYNG, et al.,
Plaintiffs in Error,
vs.
GRINNELL,
Defendant in Error.

Reply to Brief of Defendant in Error.

A few words in reply to some things said in the brief of the Attorney General:

1.—A fallacy, manifest from the beginning to the end of his brief, consists in his basing his entire argument upon a single fragmentary expression at the close of the "third finding," and his ignoring all else found by Judge Woodruff. The Court will consider the findings as they were of course intended to be considered—as a *whole*—one part limiting and explaining another.

2.—No review is sought here of any finding of fact. From the facts found, we submit, plaintiffs are entitled to a reversal of the judgment. We do

indeed introduce an additional consideration confirmatory of plaintiffs' position—by testimony presenting an *undisputed* and *simple* fact—from which (in connection with the other facts found) a conclusion of law is deducible.

The refusal of the Circuit Judge to find the conclusion requested, and his finding the opposite conclusion, we allege as *errors of law*, and our exceptions respecting them are properly presented, by the record.

The cases cited by the Attorney General, at pp. 5, 6, have no application here. They refer to findings on *conflicting* evidence, or upon testimony admitting fairly of *different inferences* of fact, which it is the province of a jury (or of a Judge sitting as a jury) to draw, —*e. g.* negligence or due care. These this Court will not disturb.

But if from *undisputed* evidence, a certain legal conclusion follows, the refusal to find this conclusion is an *error of law*, and matter of exception and review. And "the refusal to find a fact proved by uncontroverted evidence is a legal error," and matter of exception and of review here. (See Record, fol. 86.)

Mason *v.* Lord, 40 N. Y.
Grover, *J.*, at p. 484.

3.—The counsel is mistaken in saying in relation to the point shown by the testimony introduced in the record, (to-wit: that there were no other articles of merchandise known or used as flues, &c., &c.,) that "they (the witnesses) speak in all their interrogatories of *boiler* flues, while the tariff of 1864 says 'flues.'" (A. G.'s brief, p. 8, at top.) Both the tariff and the witnesses speak of

"wrought iron flues." The testimony was as broad as the tariff, and was not attempted to be disputed on the trial.

Record, fols. 44, 52, 72, 85.

The "rivetted" flues spoken of by counsel, (p. 3, at bottom,) are, it will be remembered, not articles of *merchandise* at all, and never were, but "are part of the boiler, the same as the head and shell are." "They are made by the boiler makers in making the boilers."

Record, id., and at fols. 27, 28.

4.—By the reasoning of the Attorney General (at pp. 9, 10,) there never could be articles of *merchandise* termed "flues," to answer the call of the tariff; because they can not properly be considered "flues," (argues the counsel,) until *actually applied* to their use as flues by *the consumers* of the article!

5.—"The chief demand" for the articles in question, was *not* "for the purpose of *making from them* the flues of tubular boilers." (A. G.'s brief, p. 10.)

The intimation here made, is utterly unwarranted by the findings:

"The chief demand" for the articles, "was for flues." No *making up* was requisite.

Record, fol. 21.

6.—Counsel disposes rather flippantly of Reiche *v.* Smythe, (upon which, as decided by him at the Circuit, Judge Woodruff expressly de-

cided the case at bar,) by a fantastic allusion to "the screech of a locomotive," and "the voice of the nightingale."

The logic of the Attorney General's argument, suggests a fitter application of his truly poetic conceit. He argues, that as flues are but a *species* of tubes, therefore they are not to be distinguished from other tubes. (p. 3.)

So perhaps he would argue, that as "the voice of the nightingale" is but a *species* of noise, therefore it is not to be distinguished from other noises—for instance, "the screech of a locomotive;" "they are both noises."

CHARLES DONOHUE,

of Counsel for Plaintiffs in error.

See, especially, page 7.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

CHARLES R. TYNG ET AL.
vs.
MOSES H. GRINNELL, COLLECTOR. } No. 78.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

CHARLES R. TYNG ET AL.
vs.
MOSES H. GRINNELL, COLLECTOR. } No. 78.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the defendant in error.

STATEMENT OF THE CASE.

By the tariff act of June 30, 1864, c. 171, § 3, 13 Stats. at Large, 204, (two lines at the bottom of the page,) there is imposed a duty on "steam, gas, and water tubes and flues, of wrought iron, two cents and a half per pound." By the amendatory act of March 3, 1865, c. 80, § 2, same volume, p. 493, there was an *additional* duty "on wrought-iron tubes, one cent a pound."

Under these statutes, Tyng & Co., in December, 1869, imported into New York certain wrought-iron articles of tubular form, intended to be so used in the construction of boilers as to allow the passage through them of the products of combustion, and which the importers, therefore, claimed to be *flues*, chargeable with a duty

of 2½ cents per pound under act of June 30, 1864, while they were assessed by the defendant as *tubes*, under the act of March 3, 1865, with the additional cent per pound.

The cause was submitted to the presiding judge, who found, among other things, not disputed: "Third, that said goods and merchandise so entered, and upon which the said duties were paid, were, at the time of the passage of the said several tariff acts of 1864 and of 1865, *known in commerce* and to dealers therein as and by the name of '*wrought-iron tubes*,' by which name the same were and had been at all times imported," &c., &c.; * * * "that the same were at all times, during the period aforesaid, entered by the said merchants and importers at the custom-house aforesaid, and classified by the officers of said custom-house as and by *their said commercial name* of 'wrought-iron tubes;' * * * that 'wrought-iron flues' is a subordinate designation used to indicate the purpose for which the tubes are to be employed, when ordered for such specific purpose; but they are included in the general designation of 'wrought-iron tubes,' by which name *alone*, whether butt-welded or lap-welded, they were known in trade or commerce until after the act of 1865, as above stated." Upon these facts, he states the only legal conclusion possible, thus: "Fourth, that the said goods were 'wrought-iron tubes' within the true meaning of the act of Congress" aforesaid, approved March 3, 1865, imposing the additional duty of one cent a pound. (Record, 5, 6.)

BRIEF.

How these articles were commercially known, designated, and classified was a question of *fact*. In the

construction of a tariff act it is, primarily and ordinarily, *the* one essential fact which, being ascertained, determines the meaning of the terms employed in the enactment and to what chattels they are applicable. (United States *v.* Sugar, 8 Peters, 279; Elliott *v.* Swartwout, 10 Peters, 151; 200 Chests Tea, 9 Wheaton, 438; Curtis *v.* Martin, 3 Howard, 109; Lawrence *v.* Allen, 7 Howard, 793, 794; Maillard *v.* Lawrence, 16 Howard, 261; United States *v.* Breed, 159, 163; United States *v.* Sanchet, Gilpin, 273.)

The establishment of that fact, in the case at bar, disposes of the plaintiffs' exceptions to the findings made and refused, so far as these are rulings of law; so far (and they seem largely so to us) as the exceptions are taken to findings of fact, of course they are untenable, and require no discussion.

It might reasonably be claimed that, in the first act, "and" is the equivalent of "or;" that "tubes and flues" were used to embrace all hollow wrought-iron tubular columns, whether intended to be used for flues or for some other purpose; and that the act of March 3, 1865, in using the more general term "tubes," meant to include "flues," so that the additional cent would be chargeable in any event; inasmuch as Judge Woodruff states, (Record, pages 6 and 8,) substantially, that all flues are tubes, though all tubes are not flues. Or, if a more restricted meaning be applied to "tube," confining it to hollow bodies of cylindrical shape, then these importations are included. Originally the flues of boilers were rectangular, of riveted plates, and some are so made still. The cylinders or "tubes" were at a later

day, and extensively after the passage of these acts, substituted for the former method of construction. 1 Ure's Dict., (Am. ed., 1871,) 212, and other scientific works. Rodwell's Dict. of Science, (London, 1871,) 515, says: "The boiler is an oblong cylinder, through which a number of *tubes* are arranged horizontally in communication with the furnace and chimney. By this means a very large surface is heated in contact with the water." Upon page 513, the same author makes a similar statement, in like language: "The tubular boiler is one which is *rapidly coming* into extended use, and is always employed in the locomotive. It is traversed by straight horizontal *tubes*, connected on one side with the furnace and on the other with the chimney. The hot air passes from the furnace through these tubes, so that a very large surface is heated in contact with the water."

It is immaterial, however, in this case, whether or not the act of March 3, 1865, was intended to embrace "flues" under the generic term "tubes," because the judge found as a *fact* (Record, pages 5, 7) that the goods in question were, at the time of the passage of said acts, known in commerce, and to dealers therein, as and by the name of "wrought-iron tubes," *by which name the same were, and had been at all times, imported* into the United States, and were so known, designated, and *imported* for a long time thereafter; and were so entered by the importers, and classified by the customs-officers for the period aforesaid. It is true he also finds that, in the *internal* traffic of the country, when any of these articles were wanted for the construction of boilers, (the most extensive use made of them,) they were termed "flues," to indicate the length, size, and character of tubes wanted; but that does not affect the finding as to the

term used to designate them in the importing business, nor that "tubes" are the *genus* of which "flues" are a *species*.

The findings of fact are conclusive; nor do we perceive the propriety of stating in the record the evidence reported as the basis of the plaintiffs' claim, and of the findings; since, if (as it must be conceded to be) pertinent, its sufficiency must be exclusively determined by the tribunal to which the facts are submitted. (Zeller *v.* Eckert, 4 Howard, 298; Prentice *v.* Zane, 8 Howard, 470; Graham *v.* Bayne, 18 Howard, 60; Guild *v.* Frontin, *id.*, 135; Y. & C. R. R. Co. *v.* Myers, *id.*, 251, 252; Suydam *v.* Williamson, 20 Howard, 432; Burr *v.* Des Moines, 1 Wallace, 99; Saulet *v.* Shepherd, 4 Wallace, 502; De Groot *v.* United States, 5 Wallace, 427; United States *v.* Adams, 6 Wallace, 112; Insurance Company *v.* Tweed, 7 Wallace, 44; Basset *v.* United States, 9 Wallace. 38; Norris *v.* Jackson, *id.*, 125; Copelin *v.* Insurance Company, *id.*, 467; Cooper *v.* Omohundro, 19 Wallace, 70; Crews *v.* Brewer, *id.*, 72; Express Company *v.* Ware, 20 Wallace, 543; Insurance Company *v.* Sea, 21 Wallace, 158; Jennisons *v.* Leonard, *id.*, 302.)

Prior to the act of March 3, 1865, c. 86, § 4, 13 Stats. at Large, 501, R. S., §§ 649 and 700, there could be no review of causes submitted to the judge in the circuit court, as decided in numerous cases, some of which are cited above. (Weems *v.* George, 13 Howard, 197.) The passage of that act was "a reproduction of the system in practice in many of the States," authorizing either general or special findings. (Insurance Company *v.*

Tweed, 7 Wallace, 51.) But the special finding must be "not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest;" and, whether general or special, "is conclusive as to the facts so found." (Norris *v.* Jackson, 9 Wallace, 127; Copelin *v.* Insurance Company, *id.*, 467; Coddington *v.* Richardson, 10 Wallace, 518; Crews *v.* Brewer, 19 Wallace, 72; Express Company *v.* Ware, 20 Wallace, 545.)

The question arising under a special finding is of "the sufficiency of the facts found to support the judgment," *not* whether or not the evidence adduced proved or justified the finding. (Jennison *v.* Leonard, 21 Wallace, 307; Express Company *v.* Ware, 20 Wallace, 543.)

To review the facts would violate the judiciary act, prohibiting this court from reversing any judgment for error of fact. (Crews *v.* Brewer, 19 Wallace, 72.)

By exceptions, the question of the *admissibility* of evidence may be raised; but, if rightly received, its results as proof are solely for those who judge the facts. (Richardson *v.* Boston, 19 Howard, 263; Insurance Company *v.* Lawrence, 2 Peters, 44; Van Ness *v.* Pacard, *id.*, 148, 149; Chandler *v.* Von Roeder, 24 Howard, 224; Schuchardt *v.* Allens, 1 Wallace, 359, and cases cited *supra.*)

The only legal question, then, is whether, upon the *facts* as found, no matter by what weight of testimony established, the conclusion of law that these importations were included within the terms of the act of March

3, 1865, c. 80, § 2, was correct or erroneous. (Cases above cited.)

The exception "to the concluding part of the third finding," to wit, that these articles "were known only by the name of 'wrought-iron tubes' in *trade and commerce* until after the act of 1865," is untenable, because that is purely a question of fact—the fact of commercial designation, with reference to which the tariff acts were phrased; and the practical construction for years put upon their language must go far to justify the belief that the interpretation is correct. (Bank of United States *v.* Halstead, 10 Wheaton, 63.)

Upon the facts here found, no different conclusion of law than that reached was possible.

The facts upon which the court based the third finding (as to commercial designation) *are not stated in the record;* but *only* "the testimony given on the trial, upon the point sought to be established by plaintiffs, that, at and before the time of the passage of the said tariff acts of 1864 and 1865, there were not, in the markets of the United States, any *other* articles of merchandise, or importation made of wrought iron, known, called, or used as 'flues,' excepting articles similar to those imported by the plaintiffs in this case." (Record, 9.)

This was "an immaterial issue." The court was satisfied from the evidence that *these articles were "tubes,"* commercially speaking; that nothing had been known or imported as "flues" did not change, nor tend to change, this vital fact. The plaintiffs did not offer to prove, *and no witness states, that these articles were not tubes;* nor did they propose to show that they had ever been commercially known or imported as flues, but merely that *nothing else had been so known and imported!!* (Record, (or, rather, nothing else known as "boiler flues.") "

9–29, and at folios cited by the plaintiffs.) They speak in all their interrogatories of "boiler-flues," while the tariff of 1864 says "flues." Doubtless very many "flues" for furnaces, and for *other* purposes than boilers, had been imported and paid duty under these tariffs. Incidentally to the special point made by the plaintiffs, upon which alone the testimony is reported, the *fact* kept cropping out that these articles were "tubes," but the full proof of that is not reported. (Record, 10, folio 30; 16, folio 46; 20, folio 59; 27, folio 80.)

The errors assigned are of fact and not of law, except the first, as to the testimony of Floggler. But the fact that these were "tubes" in commercial language renders that exception immaterial, even were it valid in law, which it is not. Apparently the plaintiffs construe the inquiry as to the name under which an article is *imported* as meaning simply its *custom-house* designation; while the testimony of this same witness, in answer to the question excepted to, shows that neither he nor the court so understood it; for his reply was that "it was *imported* and *sold* as an iron boiler-tube by every *importer* in the country." This was repeated in response to the next question, proposed upon cross-examination by Mr. Buel: "I don't think there is a case anywhere where they did not *sell* them as a *tube*—an iron tube." (Record, 27, bottom of page.) Nothing about "custom-house usage" here. It states the designation known and used by those persons who paid these duties, and the designation under which they invariably sold these articles to their customers in "the home market." If the case cited by plaintiffs from 9 Wheaton, 438, was intended to confine the designation to domestic trade,

the expression as to "foreign traffic," upon the last line of that page, was singularly unhappy. If a perusal of the tariff gave the *importer* of an article to understand just what duty would be exacted upon its arrival, it would seem to the ordinary mind that this information would be quite as useful to him as to anybody else.

Just *how* it is made "very evident" that this testimony of Floggler's "had *controlling* weight in the decision of the question of commercial usage in this case" is not so apparent to us as to the opposing counsel; since this testimony is reported only upon the point of there being no other articles known as *boiler*-flues, while that relating to these being tubes is nowhere stated.

All that is said upon pages 5 to 8—§§ i to iv—of plaintiff's brief, about the meaning of the word "flues" in the statute, can be answered by the finding of the court, stated in four words, *i. e.*, these importations were *tubes*. It was *only* when ordered by one particular class of artificers for a specific use that these foreign articles were ever called "flues," and then only to mark the *intended use*, and not because the more general name was not considered equally appropriate. (Record, 8, top.) The counsel refers us to "standard general scientific dictionaries" to show that flues are passages for the products of combustion. Those authorities which I have heretofore cited expressly call the passages in *boilers* through which these products escape "tubes." It may be that, *after* they have become part of a completed boiler, they may with equal propriety be called "tubes" or "flues;" but, *as imported*, they are tubes only. They may be bought and used for flues, or for any other purpose. They may be, and are, used to con-

duct water, or cold air, or the results of distillation, as well as the products of combustion, and it is only when used for the latter purpose that they are "flues." Bricks will, if properly arranged, make a cistern, a house, or other structure; but are simply bricks till the desired arrangement is developed. The amount of the finding on this point is that the chief demand for these tubes was for the purpose of making from them the flues of tubular boilers. The case cited by the plaintiffs from 16 Howard, 262, rejects the idea that shawls "could not be properly termed wearing-apparel, because they are by tailors and clothiers frequently purchased to be worked up into vests and other garments." So, we say, it is no reason for not terming these importations tubes because they are frequently purchased by boiler-makers to be worked up into tubular boilers.

No. 834 of this term. Arthur v. Cummings, decided Mar. 20/76

The gentleman says the tariff act calls for wrought-iron flues. True; but the whole drift of his argument is *boiler*-flues. These statutes also call for tubes, and, *by the universal agreement of importers and dealers in these very articles*, these importations answer the call. It is only those who purchase them for the purpose of destroying their identity as separate articles, by using them in the construction of a machine, that ever designate them by any other term than "tubes."

I reiterate that "the undisputed evidence" to which counsel refers relates only to one point in the case, and that a very different one from that on which he now attempts to raise and present an issue here.

The case of Reiche *v.* Smythe (13 Wallace, 162) has about the same degree of similarity to the one at bar that the screech of a locomotive has to the "voice of the nightingale"—they are both noises.

May a suggestion be permitted, in conclusion, as to the different effect of your decision dependent upon the grounds upon which it may be based in the opinion? There are a number of cases in the circuit courts awaiting the result of this. If this court feels at liberty to indicate the correct dutiable classification of the article in question, as a legal conclusion from the testimony stated in the record, further controversy would be avoided. But, in this particular instance, all discussion seems closed by the finding that, for the purposes of this cause at least, they are tubes.

EDWIN B. SMITH,
Assistant Attorney-General.